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SUPREME COURT, U.S.

No. 98-1022

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

ALLEN H. SMITH, *Petitioner,*
v.
MARY JANE SMITH, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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No. 98-1022

IN THE
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ALLEN H. SMITH, *Petitioner,*
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny Petitioner's request for a writ of certiorari seeking review of the Order of the Supreme Court of Pennsylvania dated September 30, 1998. The Order in question denied a Petition for Allowance of Appeal from a Decision of the Supreme Court of Pennsylvania after the Superior Court of Pennsylvania quashed an appeal from the trial court on the ground that the trial court Order was interlocutory and denied the Motion for Reconsideration.

OPINION AND ORDERS BELOW

The opinion and orders below are not published. They are set forth in the Petition and as follows:

1. The Order of the Court of Common Pleas of York County, Pennsylvania, No. 98-SU-01846-01, No. 98-SU-02008-01, No. 98-SU-02135-01, No. 98-SU-02261-01, No. 98-SU-02407-01, Memorandum Opinion, Gates, Senior Judge, Specially Presiding, October 16, 1998.

2. The Order of the Court of Common Pleas of York County, Pennsylvania, No. 80-S-4440, finding Petitioner in contempt of court. Dated September 23, 1997.

JURISDICTION

Petitioner cites 28 U.S.C. §1257(a) as the statutory provision which confers jurisdiction and cites *Mercantile Natl. Bank v. Langdeau*, 371 U.S. 555 (1963), as authority for the court to assume jurisdiction of a collateral order. As set forth more fully below, Respondent disputes the jurisdictional basis of Petitioner's request for a writ of certiorari.

STATEMENT OF THE CASE

Respondent Wife filed a divorce action against Petitioner Husband in 1980 (the "Divorce Action"). For

nearly twenty (20) years, Petitioner has filed numerous frivolous, meritless appeals, motions and petitions in order to avoid effectuation of the equitable distribution order entered by the Court.[1]

After being found in contempt of court for failing to comply with various court orders involving effectuation of the Court's equitable distribution order, Petitioner filed a Motion for Recusal of the trial court judge. The Motion was denied in accordance with Pennsylvania statutes and procedures and the Code of Judicial Conduct. On Wife's Motion, the Superior Court appeal was quashed because the lower court Order was interlocutory. Husband requested but was denied reconsideration of the Court's decision, then petitioned the Supreme Court of Pennsylvania to allow an appeal from the Superior Court decision. The Supreme Court of Pennsylvania denied the petition. Husband now petitions this Court for certiorari.

SUMMARY OF ARGUMENT

The Petition should be denied because the trial court Order *sub judice* is not a final judgment or decree. The matter of recusal can be fully reviewed upon appeal at the conclusion of this litigation. The actions taken by the trial court are consistent with prior decisions of this Court, other federal courts and state courts. Pennsylvania's recusal standards and procedures do not conflict with those of other jurisdictions, making review by this Court unnecessary.

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[1] Husband, a practicing attorney who often appears *pro se*, has filed at least twenty-nine (29) appeals, motions or petitions objecting to actions taken by the Court with respect to the Divorce Action. All have been either dismissed as interlocutory or determined to be irrelevant.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THIS COURT LACKS JURISDICTION BECAUSE THE ORDER APPEALED FROM IS NOT A FINAL JUDGMENT OR DECREE.

Petitioner cannot bring the lower court Order before this Court for review because it is not a final judgment or decree. Only final judgments or decrees rendered by a state's highest court are subject to review. 28 U.S.C. §1257(a). A final judgment is one which effectively determines the litigation. *See Richfield Oil Corp. v. State Bd. Of Equalization,* 329 U.S. 69, 72 (1946). When the order is such that it might otherwise be deemed interlocutory, the Petitioner must show that there is a final assertion of jurisdiction with no further review of that issue possible in the state Court, the threat of serious diversion of national policies and a state Court judgment on an issue anterior to and separable from the merits and not enmeshed in factual circumstances. *See Local No. 438 Construction & General Laborer's Union v. Curry,* 371 U.S. 542, 549-50 (1963).

In the instant case, the Order denying recusal is not a final order because it does not dispose of all claims or parties. *See* Pa. R.A.P. §341. Further, it is not appealable as a collateral order. *See Kenis v. Perini Corp.,* 452 Pa. Super. 634, 682 A.2d 845 (1996); *see also* Pa. Appellate Practice 2d §313:107.5. ("An order of a judge refusing to recuse is not appealable as a collateral order, because the issue can be addressed and resolved on appeal from a final judgment in the case.") Petitioner cites the *Mercantile* case for the proposition that the Court may and has assumed jurisdiction

in cases involving collateral orders in order to avoid long and complex litigation. However, the instant case involves an interlocutory order, clearly subject to appeal and review at the conclusion of this litigation. The *Mercantile* case, wherein the issue determined by this Court involved venue for the litigation, is inapposite to the instant situation. In that case, if the Court did not intervene, a court lacking jurisdiction would have proceeded to hear a case. In our case, the trial Court has had jurisdiction over this litigation for nearly twenty (20) years. Future litigation will be long and complex, regardless of the judge hearing this matter at the trial court level, due to the innumerable motions, appeals and petitions which have and most likely will continue to be filed by Petitioner in order to avoid final adjudication of this matter. Review by this Court will not prevent any unnecessary or improper hearings, as was true in the *Mercantile* case.

Further, Petitioner's initial Motion for Recusal was not timely filed and should not be considered. *See Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal. 2d 386, 139 P.2d 930 (1943); *Lawson v. Longo*, 547 So.2d 1279 (Fla. Dist. Ct. App. 1989). A motion requesting disqualification of a judge is not timely if filed after hearing of a matter and entry of an order. *See People in Interest of F.M.*, 44 Colo. App. 142, 609 P.2d 1123 (1980); *In Interest of Smith*, 396 Pa. Super. 624, 579 A.2d 889 (1990) *appeal denied*, 527 Pa. 610, 590 A.2d 296 (1991); *Wakefield v. Stevens*, 249 Ga. 254, 290 S.E.2d 58, *on remand* 163 Ga. App. 40, 292 S.E.2d 516 (1982). If Petitioner wished to object to the trial judge's involvement in this matter, such motion should have been made before hearing. Instead, Petitioner did not object to the trial judge's involvement until over ten (10) years after this judge began considering this matter and conducting hearings. In fact, significantly, Petitioner only asked that the judge be disqualified after Petitioner was adjudicated to be in contempt of court.

Accordingly, based on both Petitioner's long delay in requesting recusal of the trial court judge, as well as the interlocutory nature of the Order, the Petition lacks a jurisdictional basis.[2]

B. THE PENNSYLVANIA COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

Assuming, *arguendo*, that the trial court's Order denying recusal could be considered final, the contents of the Order are consistent with applicable decisions of this Court.

The Court previously was asked and declined to consider situations analogous to the instant case wherein parties asked that judges be recused. *See Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 905, *cert. den.* 455 U.S. 983, *habeas corpus proceeding* 479 U.S. 1101, *habeas corpus proceeding* (C.A.4 Va.) 897 F.2d 709, *reh. den., en banc* (C.A.4 Va.) 1990 U.S. App. Lexis 4943; *see also Com.*

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[2] Even if the Order was a final Order and subject to review at this time by the state appellate courts and this Court, it is unlikely that the Order would be reversed and the trial judge removed from further consideration of this matter. When a separate judge reviewed the facts and pleadings of this case in order to adjudicate related claims between Petitioner, Respondent and Respondent's counsel, that judge commented that final adjudication of the Divorce Action had been "shamefully protracted" due to the "rich variety of answers, petitions, motions and numerous unsuccessful interlocutory appeals" filed by Petitioner. That judge dismissed with prejudice, *sua sponte*, five proceedings filed by Petitioner against Respondent and her counsel, finding that Petitioner's claims and allegations were meritless. Based on this commentary on Petitioner's actions and disposition of Petitioner's claims by a separate trial judge, Respondent believes that any reviewing Court would not find that Orders against Petitioner in the Divorce Action by the trial judge were unfair, prejudicial or biased.

v. Miller, 541 Pa. 531, 664 A.2d 1310, *cert. den., Miller v. Pennsylvania*, ____ U.S. ____, 116 S.Ct. 932, 133 L.Ed.2d 859 (1995).

Similarly, this Court has declined to rule in other cases, indicating that the entry of rulings adverse to a party does not constitute bias or necessitate disqualification of a judge or review by this Court. *U.S. v. Azhocar*, 581 F.2d 735, *cert. den.* 440 U.S. 907 (1978). Significant to our case, these cases have held that information or evidence adduced during trial of a matter does not necessitate disqualification of a judge. All of the alleged instances of bias cited by Petitioner to support his motion for disqualification occurred during the nineteen-year trial of this matter. Therefore, Petitioner's claims of bias or prejudice do not warrant review both because his claims are meritless and because the Orders entered in this case are consistent with well-established, previously reviewed precedent. *U.S. v. Phillips*, 664 F.2d 971, *cert. den. Meinster v. U.S.*, 457 U.S. 1136, *Myers v. U.S.*, 457 U.S. 1136 and *Platshorn v. U.S.*, 459 U.S. 906 (C.A. Fla. 1981). Under federal statutes, as well as a multitude of cases decided under federal and state law, these alleged instances of bias by the judge are insufficient to establish cause for disqualification. *See* 28 U.S.C.S. §144, 455; *U.S. v. Phillips, supra.*

C. THE PENNSYLVANIA COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATES OR THE U. S. COURT OF APPEALS.

Petitioner cites a single Law Review article in an attempt to establish that the Petition raises an important federal question and/or that there is conflict among the courts

with respect to recusal of judges. However, directly contradicting the single article cited by Petitioner, commentators have reported that, like Pennsylvania,

> "[i]n many jurisdictions, the judge determines the question of his own disqualification; the determination of whether the judge should disqualify himself is committed to the judge's discretion, which should be exercised in light of the state's Code of Judicial Conduct, and in consultation with the judge's own emotions and conscience regarding his or her capacity to rule fairly."

46 Am. Jur. 2d, "Judges," §214. *See Haddad v. Gonzalez,* 410 Mass. 855, 576 N.E.2d 658 (1991). Other jurisdictions permitting review of a recusal petition by an individual judge include Alaska (*Feichginger v. State*, 779 P.2d 344 (Alaska App. 1989)); Arkansas (*Korolko v. Korolko,* 33 Ark. App. 194, 803 S.W.2d 948 (1948)); Maine (*Brendla v. Acheson,* 554 A.2d 798 (Me. 1989)); Utah (*State v. Byington,* 114 Utah 388, 200 P.2d 723 (1948)); and Virginia (*Taylor v. Taylor,* 185 Va. 126, 37 S.E.2d 886, *reh. den.* 185 Va. 416, 38 S.E.2d 449 (1946)).

Further, as noted previously, courts considering recusal have clearly established that disqualification of a judge for bias or prejudice is not required or appropriate when that judge has acquired opinions or beliefs regarding the merits of a party's position or claims, provided that the judge's opinions or beliefs do not result from extra-judicial sources. *See Haddad, supra.*; *Johnson v. Trueblood*, 629 F.2d 2987 (3rd Cir. 1980); *Brendla, supra.*; *In re Estate of Lang*, 398 N.W.2d 569 (Minn. Ct. App. 1986).

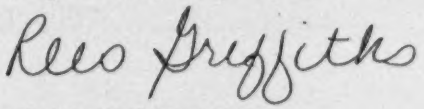
Accordingly, as demonstrated by the numerous decisions cited herein, the Order denying Petitioner's Motion

for Recusal was not a violation of any constitutional right of Petitioner and was in accordance with the statutes and guidelines of Pennsylvania and numerous other states and federal courts.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,



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IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

ALLEN H. SMITH,	:	
Plaintiff	:	Nos. 98-SU-1846-01
v.	:	98-SU-02008-01
BEVERLY POINTS,	:	98-SU-02135-01
REES GRIFFITHS, and	:	98-SU-02261-01
BARLEY, SNYDER,	:	98-SU-02407-01
SENFT & COHEN,	:	
Defendants	:	

***

ALLEN H. SMITH,	:	
Plaintiff	:	
v.	:	No. 98-SU-02407-01
MARY JANE ST. ONGE,	:	
Defendant	:	

ORDER OF COURT

AND NOW, to wit, this 16th day of October, 1998, upon consideration of the briefs of the parties and after hearing oral argument, it is the Order of this Court that the Complaints are dismissed with prejudice.

BY THE COURT

(Signed), S.J.
G. THOMAS GATES,
Senior Judge
Specially Presiding

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

ALLEN H. SMITH,	:	
Plaintiff	:	Nos. 98-SU-1846-01
v.	:	98-SU-02008-01
BEVERLY POINTS,	:	98-SU-02135-01
REES GRIFFITHS and	:	98-SU-02261-01
BARLEY, SNYDER,	:	98-SU-02407-01
SENFT & COHEN,	:	
Defendants	:	

***

ALLEN H. SMITH,	:	
Plaintiff	:	
v.	:	No. 98-SU-02407-01
MARY JANE ST. ONGE,	:	
Defendant	:	

APPEARANCES:

ROBERT J. STEWART, ESQUIRE and
PAUL W. MINNICH, ESQUIRE FOR DEFENDANTS

ALLEN H. SMITH, ESQUIRE PRO SE

MEMORANDUM OPINION, GATES, SENIOR JUDGE, SPECIALLY PRESIDING, OCTOBER 16, 1998.

This shamefully protracted divorce proceeding began more than twenty years ago when Mary Jane Smith (now Ms. St. Onge) separated from Allen H. Smith, an Attorney. The divorce proceedings however did not commence until 1980.

From that date forward Mr. Smith has deluged the Court with a rich variety of answers, petitions, motions and numerous unsuccessful interlocutory appeals. It is obvious that he is resisting the Court's Equitable Distribution Decree with every tool in a lawyer's chest.

Throughout these proceedings Ms. St. Onge has been represented by Beverly Points, Rees Griffiths, Barley, Snyder, Senft & Cohen, LLC. Having exhausted his dilatory proceedings in the divorce case, Mr. Smith now directs his attention and energies to attacking his former wife's lawyers. In this regard he has filed four civil lawsuits claiming damages against the law firm and a fifth action against his former wife for allegedly employing and encouraging her lawyers to take action in conjunction with the divorce proceeding.

The Defendant lawyers now ask that these proceedings either be dismissed for failing to state a cause of action or transferred to and be consolidated with the divorce proceeding presided over by the Honorable Oscar F. Spicer,

the President Judge of Adams County who is specially presiding in the divorce case and before whom Mr. Smith must appear in the contempt proceeding.

In the lawsuit filed to No. 98-SU-02008-01 Smith complains that the Defendants have subpoenaed witnesses in the discovery process in violation of Rule 1701 of the Pennsylvania Rules of Appellate Procedure. We fail to see the applicability of the Rule. The trial Court has taken no action. The Defendants, as part of the divorce action, are attempting to determine if Mr. Smith improperly dissipated marital assets of stock and the inquiry is quite relevant to the enforcement of the Decree of Marital Distribution as well as what appropriate sanctions should be imposed for Mr. Smith's contempt of the Court Order. Thus we do not believe that the conduct alleged in this Complaint is actionable and we shall dismiss it.

In action No. 98-SU-02261-01 Smith also complains about a subpoena directed to another bank seeking information concerning marital and non-marital property. He

complains that the information sought by the Defendant attorneys has proved or may prove to be harmful to the Plaintiffs. It certainly may be but that is its purpose in order to provide the court with information necessary to carry out the Decree of Marital Distribution and to impose appropriate contempt sanctions. It is not unlawful conduct by aiding and abetting a breach of fiduciary duty on the part of the bank as the Defendant contends. Plainly no cause of action has been made out in this Complaint and it too will be dismissed.

In Action No. 98-SU-02135-01 Smith complains about Judge Spicer's award of counsel fees on two separate occasions based in part upon the fact that Mr. Smith has unduly burdened Ms. St. Onge by taking numerous fruitless appeals. If Smith has a remedy it is by way of the appellate process and not by the institution of a lawsuit against the beneficiaries of the Court's Order. Any complaint that Smith has about the nature and amount of counsel fees awarded in a divorce proceeding does not form the basis of a separate and independent lawsuit alleging that the defendants "maliciously

intended to abuse and did abuse the order of the Superior Court." As a consequence we will dismiss this action.

In Action No. 98-SU-01846-01 Smith complains that the Defendants maliciously and unlawfully was removed from his law office at 47 N. Duke Street and that his personal property was unlawfully seized.

In the Divorce Proceeding the trial judge entered a Decree that all real estate is to be either sold or distributed to Ms. St. Onge. It is the attempts to enforce this Decree that Mr. Smith basis this Complaint. However, in order to effectuate the Decree, the Defendants filed a motion to enforce the Decree and the Judge, by an Order dated February 3, 1997, again found that all real estate should be distributed to Ms. St. Onge. The Order granted her the right to list the property with any broker she chooses and deems suitable in order to sell the property. On the other hand, Mr. Smith ignored the Order and, without requesting the Court for clarification, if any was needed, refused to allow access to

the property and appropriate enforcement proceedings were necessary.

Again we find that the Defendants actions do not form the basis for a separate and independent lawsuit. They had a duty and obligation to their client to attempt to obtain satisfaction of the Court's order. Consequently, if he has any complaints about this matter. They should have been addressed to the Court in the Divorce Proceedings. Thus we shall dismiss this complaint.

Finally, in Action No. 98-SU-02407-01 Smith complains that his former wife engaged the services of the law firm of Barley, Snyder, Senft & Cohen who have engaged in activities that have resulted in three abuse of process suits having been filed against them and one suit for aiding and abetting a breach of fiduciary relationship. He complains that she is guilty of either a negligent tort or an intentional one by engaging or encouraging her attorneys to commit the acts which he claims forms the basis for the foregoing lawsuits. Inasmuch as we find that there was no

misconduct on the part of Ms. St. Onge's counsel; that they acted appropriately under the circumstances; there is no basis upon which they can be successfully sued. It follows then that there can be no liability on the part of Mary Jane St. Onge for employing them.

We have given careful consideration to the briefs of counsel and we are discouraged to find that, within limits, the law allows the use of process to frustrate and effectively defeat valid claims for Marital Distribution. These proceedings must be brought to an end and unfortunately the only remedy appears to rest with the Judge before whom the Plaintiff here will stand to justify his contemptuous conduct. We are at a loss to do anything to effectively end the Divorce Proceedings and to assure Ms. St. Onge that she receives full satisfaction of the Court's decrees. However, we can and we shall promptly dismiss all of these meritless complaints.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
Civil

Mary Jane Smith 80-S-4440

vs.

Allen H. Smith

ORDER OF COURT

AND NOW, this 23rd day of September, 1997, after a hearing, the Court enters the following rulings:

1. With respect to the shares of PNC Bank which should be part of equitable distribution and the status of which cannot presently be determined, the Court directs that this matter be continued until October 29, 1997, at 1:00 o'clock p.m. The Court will sign an order prepared by Plaintiff's counsel directing that PNC Bank produce its records either to the parties prior to that time or to the parties and the Court on that date.

At the time set, counsel for Defendant shall provide the Court with a detailed written statement describing the transaction whereby certain stock in PNC

Bank was sold and the proceeds applied to the Master's fees and costs. There's a question at this time as to precisely what stock was sold. Testimony indicates that a portion of jointly held stock was sold and that counsel for the Defendant handled the transaction. The request for an adjudication of contempt regarding that stock is deferred pending the outcome of the hearing on October 29, 1997.

2. The petition for an adjudication of contempt for failure to pay attorneys fees previously ordered in the equitable distribution decree is granted. The Defendant is adjudicated in willful contempt of Court. The Defendant's plea to schedule payments in this matter is refused for lack of supporting evidence. Sentence is deferred pending the outcome of the hearing on October 29, 1997. Furthermore, Defendant is directed to pay an additional $14,000 in attorney's fees for frivolous appeals since the order was entered under which Defendant is adjudicated in contempt.

3. The request for termination of alimony pendente lite is denied. It is obvious that this case is not yet finished and that the alimony should continue.

Costs shall be paid by the Defendant.

BY THE COURT,

(Signed)
Oscar F. Spicer
Specially Presiding

Rees Griffiths, Esq.
Leo Gribbin, Esq.
rhk

smithbsc